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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 224

REUBEN FRANKLIN BASKIN, by his guardian ad litem and trustee, Catherine Dunn,

Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, KAISER COMPANY, INC., and HARTFORD ACCIDENT & INDEMNITY COMPANY,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Comes now the respondent Industrial Accident Commission of the State of California and respectfully submits its brief in opposition to the petition for writ of certiorari filed by Petitioner Reuben Franklin Baskin, by his guardian ad litem and trustee, Catherine Dunn.

Petitioner seeks to review a decision of an intermediate state appellate court of the State of California, which decision affirmed an order of dismissal for want of jurisdiction of petitioner's claim for workmen's compensation benefits made by the Industrial Accident Commission of the State of California.

JURISDICTION

The question presented by this proceeding is undoubtedly within the jurisdiction of the United States Supreme Court. However, as respondent will demonstrate hereinafter, the decision of the California District Court of Appeal affirming an order of dismissal of the State Industrial Accident Commission was in accord with the applicable decisions of the United States Supreme Court and no reason exists for granting the writ of certiorari prayed for by the petitioner.

STATEMENT OF THE CASE

The statement of the case requisite to a determination of the issue presented by petitioner is adequately and correctly set forth at pages 2 through 4 of the petition for writ of certiorari.

SUMMARY OF ARGUMENT

1. Workmen repairing a commissioned vessel in navigable waters are engaged in maritime employment and injuries arising therein are within the exclusive admiralty jurisdiction.

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2. The "twilight zone" rule and the presumption of constitutionality attendant upon a state workmen's compensation statute is inapplicable where said state statute works material prejudice to the characteristic features of the general maritime law.

ARGUMENT

1. Workmen Repairing A Commissioned Vessel In Navigable Waters Are Engaged In Maritime Employment, and Injuries Arising Therein Are Within the Exclusive Admiralty Jurisdiction

The repairing of a commissioned vessel on navigable waters is a maritime contract and those employees who perform the work are engaged in maritime employment.

John Baizley Iron Works v. *Span* 281 U. S. 222, 232, 50 S. Ct. 306, 74 L. Ed. 819;

Robins Drydock & Repair Co. v. *Dahl,* 266 U. S. 449, 45 S. Ct. 157, 69 L. Ed 372;

Great Lakes, etc. Co. v. *Kierejewski,* 261 U. S. 479, 43 S. Ct. 418, 67 L. Ed. 756.

Injuries sustained by an employee in the course of making repairs aboard a commissioned vessel in navigable waters are within the exclusive admiralty jurisdiction in that it has direct and intimate connection with navigation and commerce. State compensation laws may not be applied.

John Baizley Iron Works v. *Span,* 281 U. S. 222, 232, 50 S. Ct. 306, 74 L. Ed. 819;

Messel v. *Foundation Co.,* 274 U. S. 427, 434, 47 S. Ct. 695, 71 L. Ed. 1135;

Robins Dry Dock Co. v. *Dahl,* 266 U. S. 449, 457, 45 S. Ct. 157, 69 L. Ed. 372;
Gonsalves v. *Moore Dry Dock & Repair Co.,* 266 U. S. 171, 172, 45 S. Ct. 39, 69 L. Ed. 228;
Great Lakes Dredge & Dry Dock Co. v. *Kierejewski,* 261 U. S. 479, 480, 481, 43 S. Ct. 418, 67 L. Ed. 756.

Admiralty jurisdiction does not depend on the frequency with which maritime work is performed by the employee. Exclusive admiralty jurisdiction is not ousted by the intermittent nature of maritime employment.

Parker v. *Motor Boat Sales Co.,* 314 U. S. 244, 62 S. Ct. 221, 86 L. Ed. 184;
Liability Assur. Corp. v. *Cook,* 281 U. S. 233, 236, 50 S. Ct. 308, 74 L. Ed. 823;
Northern Coal & Dock Co. v. *Strand,* 278 U. S. 142, 144, 49 S. Ct. 88, 73 L. Ed. 232.

2. The "Twilight Zone" Rule and the Presumption of Constitutionality Attendant Upon A State Workmen's Compensation Statute Is Inapplicable Where Said State Statute Works Material Prejudice to the Characteristic Features of the General Maritime Law

The "twilight zone" rule announced in the case of *Davis* v. *Department of Labor,*[1] founded on the concept of dual presumptions leading to an overlapping of federal and state jurisdictions, relied on by petitioner, has no application where an employee is injured while engaged in repairing a commissioned

[1] 317 U. S. 249, 63 S. Ct. 225, 87 L. Ed. 246.

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vessel in navigable waters. It was pointed out by the Supreme Court in the *Davis* case opinion, at page 252:

> "A line of opinions of this court beginning with *Southern Pacific Co. v. Jensen,* 244 U. S. 205, 216, 37 S. Ct. 524, 529, 61 L. Ed. 1086 . . ., held that under some circumstances states could but under others could not, consistent with Article 111, §2, of the Federal Constitution, apply their compensation laws to maritime employees. *State legislation was declared to be invalid only where it 'works material prejudice to the characteristic features of the general maritime law,* or interferes with the proper harmony and uniformity of that law in its international and interstate relations'." (Italics ours.)

The circumstances under which states cannot, consistent with Article 111, Section 2, of the Federal Constitution, apply their compensation laws to maritime employees, as stated in the *Jensen* case and those that followed it, have never been overruled, and have been reiterated as a correct statement of the law as applied to state workmen's compensation statutes by the United States Supreme Court.

Standard Dredging Corp. v. *Murphy,* 319 U. S. 306, 309, 63 S. Ct. 1067, 1068;
Davis v. *Dept. of Labor,* 317 U. S. 249, 63 S. Ct. 225, 87 L. Ed. 246.

The *Davis* case clearly establishes that the "twilight zone" therein promulgated referred to borderline cases where, from the factual situation involved, the nature and circumstances of the employment fall within the indefinable border marking the end limits

of state jurisdiction on the one side and federal jurisdiction on the other.

> "Harbor workers and longshoremen employed 'in whole or in part upon the navigable waters' are clearly protected by this Federal Act; *but employees such as decedent here occupy that shadowy area within which, at some undefined and indefinable point, state laws can validly provide compensation.*" (Italics ours.)
>
> *Davis* v. *Dept. of Labor, supra,* p. 253.

And at page 256, it was further pointed out that:

> "There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements."

The facts of the *Davis* case illustrate the basis upon which the presumption of constitutionality of the state statute was indulged. Those facts are completely at variance with the facts herein. Davis was a structural steel worker engaged in dismantling an abandoned drawbridge which spanned the Snohomish River. The steel when cut from the bridge was lowered to a barge on the river below. Davis' duty was to examine the steel after it was lowered to the barge, and, when necessary, to cut the pieces to proper lengths with an oxyacetylene torch. From this barge he fell or was knocked into the stream in which his body was found.

Davis v. *Dept. of Labor,* 317 U. S. 225, 226, 227, 63 S. Ct. 225, 87 L. Ed. 246.

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The basis for the attempted invoking of admiralty jurisdiction stemmed from the sole fact that the employee's work was being performed on navigable waters and that his death occurred therein. No maritime employment was involved; on the contrary, it was entirely nonmaritime in character.

Petitioner herein was engaged in the repair of a commissioned vessel in maritime waters at the time of his injury, a long-established maritime employment. The California District Court of Appeal properly rejected the "twilight zone" argument as not controlling when it said, (R., 97):

> "Petitioner's case instead of being in the 'twilight zone' is definitely on the same side of the line as the numerous cases (some of them cited herein) which have followed the rule which *Southern Pacific Co. v. Jensen,* * * * laid down before the present federal compensation law was enacted, but which has been adhered to ever since in cases arising under this act."

In the light of the decided cases holding that the work of repairing a commissioned vessel has a direct relation to navigation or commerce, and that the application of state compensation statutes to injuries sustained by workmen while so engaged would work material prejudice to the essential features of the maritime law, there is no basis upon which the presumption of constitutionality of the state statute may be indulged. The constitutional question of "interference with the proper harmony and uniformity of

maritime law" has been decided adversely to state jurisdiction upon the facts presented in this case.

In support of the contention that injuries sustained by an employee while engaged in intermittent maritime employment (repairing a commissioned vessel in navigable waters) fall within the "twilight zone," petitioner refers to the opinion in *Moore's* case[1] and the per curiam decision of this court[2] affirming the judgment in *Moore's* case.[3]

In the *Moore's* case, the court predicated its opinion on an assumption that the *Davis* case was intended to be a *revolutionary decision* including within a wide circle of doubt *all* waterfront cases involving aspects pertaining both to the land and to the sea *where a reasonable argument can be made either way;* that the law was definitely altered by the court's decision in the *Davis* case; and that the occasional presence of a workman in an ordinary land occupation on a vessel to make repairs was within the "twilight zone."[4]

The facts of the case disclose that Moore was aboard a commissioned vessel in navigable waters undergoing repairs, at the time of his injury. However, it further appeared that his work was variously on piers, dry docks and ships at the employer's plant. Some of the time he directed the efforts of other "tag men," fixing

[1] *Moore's* case (S. J. Ct. Mass., 1948), 323 Mass. 462, 80 N. E. (2d) 478.

[2] *Bethlehem Steel Co.* v. *Arthur J. Moore* (December, 1948), 335 U. S. 874, 69 S. Ct. 239, 93 L. Ed. 123, aff'g. 323 Mass. 462, 80 N. E. (2d) 478.

[3] The *Bethlehem Steel* case was decided by this court in December, 1948, after the matter herein prayed to be reviewed had been submitted to the California District Court of Appeal. That court did not, accordingly, have the opportunity to consider the decision, nor, because of the time element involved, was it available either to it on the petition for rehearing or to the Supreme Court of California on the petition for hearing therein.

[4] *Moore's* case 323 Mass. 462, 80 N. E. (2d) 478, at pp. 480-81.

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the hooks which were on the chains of the cranes to material to be moved and directing its movement from piers on land to dry docks or ships. The major portion of his work was on the piers, but occasionally it took him aboard vessels. At the time of his injury, caused by slipping on the step of a gun mount while aboard the vessel, Moore was endeavoring to position himself so that his crane operator could see the signals he was about to make relative to directing the movement of a draft of material.[1]

Thus, it is evident that Moore's presence aboard the vessel was not occasioned by active participation in the general work of repairing the ship itself, but was incident to performing his usual duties normally executed from the pier. His presence aboard a commissioned vessel on navigable waters at the time of injury was in furtherance of his nonmaritime duties. A factual situation identical to that which existed in the *Davis* case.

Thus, although the Massachusetts court founded its decision on the assumption that the employee was engaged in the repair of a commissioned vessel at the time of his injury, the applicability of the "twilight zone" rule and the presumption of constitutionality of the state statute are clearly apparent.

This court's affirmance of *Moore's* case on appeal did not expressly adopt or incorporate the opinion of the Massachusetts court in its decision. To the contrary, this court only affirmed the judgment of the

[1] *Moore's* case, 323 Mass. 402, 80 N. E. (2d) 478, 479.

Massachusetts court, citing *Davis* v. *Dept. of Labor* as supporting authority.[1]

As indicated, supra, pp. 9-10, the facts of the *Bethlehem Steel* case bring it within the "twilight zone" of the *Davis* case, despite the significance attached to the latter case by the Massachusetts court. Accordingly, the decision of this court in the *Bethlehem Steel* case can only be deemed controlling authority for petitioner's position if, by affirming the judgment in *Moore's* case, this court intended thereby to approve, accept or adopt in toto, and by implication, the opinion of the Massachusetts court.

CONCLUSION

The decision of the California District Court of Appeal is in complete accord with the controlling decisions of this court. Petitioner, at the time his injuries were sustained, was employed on shipboard in work of a maritime character. His activities contributing to the repairs to the vessel had a direct relation to navigation and commerce. Under such circumstances the application of the California statute would work material prejudice to the characteristic features of the general maritime law and would be in derrogation of the exclusive admiralty jurisdiction.

The uniformity of the decisions of this court, that state workmen's compensation statutes may not be extended to workmen injured while engaged in ship repair work on a commissioned vessel in navigable waters clearly defines the jurisdiction and the act

[1] *Bethlehem Steel Co.* v. *Arthur J. Moore*, 335 U. S. 874, 69 S. Ct. 239, 93 L. Ed. 123, aff'g. 323 Mass. 462, 80 N. E. (2d) 478.

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under which such an employee may seek his remedy. There is no doubt as to which act applies. The facts and the law applicable thereto establish that petitioner's case does not fall into the "twilight zone" but is definitely within the exclusive federal jurisdiction.

It is respectfully submitted that unless this court intended to impliedly approve and adopt the reasoning of the Supreme Judicial Court of Massachusetts in *Moore's* case, in affirming the judgment in the *Bethlehem Steel* case, the decision of the California District Court of Appeal must be sustained.

For the reasons hereinbefore set forth, it is respectfully urged that the petition for writ of certiorari be denied.

Dated, San Francisco, California.
September 1, 1949.

Respectfully submitted,

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